U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 26Mar2002

In the Matter of		
FRED HATFIELD,		
Claimant,		
v.	**Case No.:**	**1997-BLA-1670**
ARCH OF KENTUCKY, INC.,		
Employer, and		
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,		
Party-in-Interest.		

DECISION AND ORDER ON REMAND FINDING CONTROVERSION UNTIMELY AND GRANTING BENEFITS

This proceeding arises from a refiled claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq.* (hereafter "the Act"[1]) with implementing regulations appearing at Title 20 of the Code of Federal Regulations[2] filed by Claimant Fred Hatfield (hereafter "Claimant") on June 16, 1993. This matter is on remand from the Benefits Review Board (hereafter "BRB" or "Board"), pursuant to its *en banc* Decision and Order of May 16, 2001 which vacated the February 18, 1999 Decision and Order Denying Modification and Granting Benefits issued by the undersigned administrative law judge.

---

[1] The Act was adopted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, and was amended by the Black Lung Benefits Act of 1972, the Black Lung Reform Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981.

[2] These regulations were recently amended. ***See*** 65 Fed. Reg. 79,920 (Dec. 20, 2000). However, under 20 C.F.R. § 725.2 (2001), the 1999 version of specified sections is to be applied to claims pending on January 19, 2001. Also, standards for the administration of clinical tests appearing in Subpart B of Part 718 (sections 718.101 through 718.107) only apply to evidence developed after January 19, 2001. The applicability of these amendments to the instant case is discussed in footnote 4 below. Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

The Board remanded for a hearing[3] solely on the issue of whether there was good cause for the untimely controversion of the Notice of Initial Findings filed by Employer Arch of Kentucky, Inc. (hereafter "Employer") pursuant to section 725.413(b)(3) (1999).[4] For reasons set forth below, I find that the Employer has failed to establish good cause for the untimely controversion, and the claim for benefits is therefore granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS AND PROCEDURAL BACKGROUND

Claimant filed the claim for Black Lung Benefits giving rise to this action (which is a refiled claim) on June 17, 1993. (DX 1). On the form, Claimant indicated that he discontinued working in the coal mine industry in June 1987 after working approximately 30 years for various coal companies.[5] (DX 1, 2). Claimant also indicated that he previously filed for federal black lung benefits, but his claim was denied, and that he was previously awarded state workers' compensation benefits against Arch of

[3] Both parties agreed to a hearing on the record (i.e., based upon documentary evidence) for the matter currently before this tribunal. However, a formal, oral hearing was previously held before the undersigned with these parties on March 24, 1998. References to the Director's Exhibits 1 through 77, admitted into evidence at the March 24, 1998 hearing, held in Abingdon, Virginia, appear as "DX" followed by the exhibit number and references to Employer's Exhibits appear as "EX" followed by the exhibit number. References to the hearing transcript (Official Report of Proceedings) appear as "Tr." followed by the page number.

[4] That section was repealed by the new regulations, that became effective on January 19, 2001. New section 725.413 [Reserved] is blank. Although its counterpart in the new regulations, section 725.412, is one of the sections exempted from immediate application in section 725.2(c), section 725.413 is not. The Board was not apparently troubled by this omission and appears to have assumed that the old version of section 725.413 should be applied based upon the exemption of section 725.412, as indicated in footnote 1 on page 2 of its May 16, 2001 *en banc* decision. Thus, I will proceed based upon the Board's guidance. In that same footnote, the Board has cited the 2000 volume section 725.413, stating it is applicable to claims filed after January 19, 2000 (sic), although the revised regulations provided that the edition revised as of April 1, 1999 is applicable to claims pending on January 19, 2001 for the sections exempted. 20 C.F.R. §725.2 (2001). However, the April 1, 1999 version of 20 C.F.R. consists entirely of a cover indicating that the April 1, 1998 version should be retained as there were no amendments to the April 1, 1998 version. In any event, both the 1998/1999 and 2000 versions of section 725.413 are identical.

[5] At the March 24, 1998 hearing, the parties stipulated to a minimum of twenty-five years of coal mine employment. (Tr. at 14).

Kentucky, Inc., which is also the responsible operator in this action.[6] (DX 1). Employer was placed on notice of this action via a Notice of Claim, sent by the claims examiner on July 21, 1993. (DX 18). Employer filed an operator response form on August 11, 1993, admitting that it was the responsible operator, as defined by the Act. (DX 19).

On December 1, 1993, the claims examiner issued a Notice of Initial Finding (of entitlement), which found that Claimant became totally disabled on June 17, 1993 and that Employer was liable to pay benefits to Claimant. (DX 13). On the Notice, the Coal Mine Operator is identified as "Arch of Kentucky, Inc." with the address "c/o Underwriters Safety & Claims"; the Notice indicates that copies were provided, *inter alia*, to both "Arch of Kentucky, Inc. c/o Underwriters Safety & Claims" and counsel H. Kent Hendrickson, Esq.; and certified mail post cards reflect delivery on December 10, 1993 to Underwriters Safety & Claims (signed by S. Marlow as Agent) and on December 8, 1993 to Mr. Hendrickson (signed by D. Hensley as Agent). This notice included provisions explaining how a dissatisfied party may contest the findings and indicated that "fail[ure] to respond within thirty (30) days . . . shall be considered a waiver of [the] right to contest this claim unless good cause is shown to excuse such failure (20 CFR 725.413)." (DX 13). The claims examiner also advised Claimant that Employer could perfect appellate rights to challenge the decision and that Claimant's right to receive benefits would not be final until all evidence submitted by the employer had been evaluated, provided that the employer actually contested the findings within the thirty day period prescribed by the regulations. (DX 13).

Employer filed an employer controversion form (disputing the claim on its merits) signed by its counsel and dated February 22, 1994, together with a hearing request from its counsel, both of which were received on February 23, 1994, well after the thirty day period prescribed by the regulations lapsed. No explanation was given for the delay in responding. (DX 15).

On March 8, 1994, the District Director notified Claimant that the thirty day period had elapsed and Employer had not submitted any materials contesting the claim. (DX 14). Specifically, the District Director wrote:

---

[6] Claimant filed his initial claim for benefits under the Act on January 5, 1988. This claim was denied by the U.S. Department of Labor's Employment Standards Administration, Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation (hereafter "OWCP" or "DCMWC") on June 1, 1988. The OWCP stated that Claimant failed to show (1) that he had pneumoconiosis; (2) that, even if he had the disease, it was caused at least in part by his coal mine employment; and (3) that he was totally disabled by the disease. Ultimately, this action was heard by an Administrative Law Judge, Clement J. Kichuk, in the Office of Administrative Law Judges (hereafter "OALJ"), who determined that benefits should not be awarded due to the fact that Claimant "[was] not totally disabled by pneumoconiosis arising out of coal mine employment." It should be noted that Employer filed a timely employer controversion form in connection with that action. The entire record regarding the prior claim is contained in DX 26-1.

> The thirty (30) day period specified in 20 CFR 725.414[7] for operator response to the Notice of Initial Finding has expired; timely response to the Notice of Initial Finding has not been received. Accordingly, [Employer] is deemed to have accepted the Initial Finding of the District Director and shall not, except as provided in 725.463,[8] be permitted to raise issues or present evidence with respect to issues inconsistent with the Initial Finding in any further proceeding conducted with respect to the claim.

(DX 14).[9] After receiving this determination, Employer promptly filed a letter, in which it acknowledged filing the operator controversion after the thirty day period expired, but argued that good cause existed to excuse it from this procedural miscue.[10] (DX 20). The explanation by Employer's counsel at the time for the delay consisted of the following statement in counsel's letter:

> I filed an operator controversion on February 22, 1994, contesting the initial finding of elig[i]bility, and a copy is attached. It was filed more than 30 days after the "notice of initial finding" dated December 1, 1993; however due [to] some perso[nn]el changeovers in the last two months or so in this office, a very few things got miscal[e]ndared or not cal[e]ndared at all. This was one. The perso[nn]el problem was resolved; nevertheless, a problem in this case remains. There is no doubt that it is my responsibility that the controversion was late, but in fairness, a clerical error under

---

[7] Section 725.414(b) provided that "[w]ithin 30 days from the date on which notice of the [district director's] initial findings of eligibility and liability is sent to the parties, each party shall either accept or contest any or all such initial findings. . ." and that "[t]he failure by an operator to respond to initial findings of eligibility. . . shall have the same consequences as an operator's failure to respond to notice of a claim (see §725.413(b)(3))." Although section 725.414 provides that the thirty day period is measured from the date that the notice of the initial findings is sent to the parties, section 725.413 requires action within thirty days of receipt of notification. The response was untimely under either section.

[8] Section 725.463 (in both its original form and as amended) confines black lung hearings to issues identified by the district director (previously known as deputy commissioner) or raised in writing before the district director, except for new issues that the administrative law judge finds were not reasonably ascertainable by the parties when the claim was before the district director.

[9] The actual award of benefits contained a similar passage at paragraph 9. (DX 14).

[10] Employer also noted that neither the claims examiner nor the district director indicated whether Claimant proved that a material change in conditions existed, the proper standard for duplicate claims. Throughout the course of these proceedings, Employer has continued to raise this point. (*See, e.g.*, DX 57, at 3). However, I need not address this issue, as the only issue before this tribunal at this time is the good cause issue.

these circumstances should not be interposed to prevent [Employer] from defending this claim.

(DX 20). The District Director denied Employer's request to reopen the claim via letter dated March 23, 1994, succinctly stating that Employer's explanation was "insufficient for a finding of good cause." (DX 21). However, Employer was apprised of its right to appeal this determination, as the District Director wrote that "[s]hould you [Employer] disagree with this finding, you may request a formal hearing on the good cause issue only." (DX 21 (emphasis in original)). On April 14, 1994, Employer was advised that no good cause had been found for the untimely response and payments should begin to be made. (DX 23). Employer requested a hearing before the OALJ on April 25, 1994.[11] (DX 25).

Following the May 27, 1994 transmittal of this case to the OALJ (DX 27), the parties (and judges) focused more on substantive issues raised by the claim rather than the procedural-timeliness issue.[12] In an unpublished decision of September 25, 1995, the Benefits Review Board reversed Administrative Law Judge Charles P. Rippey's Order of Dismissal and remanded the action for reconsideration solely on the good cause issue.[13] (DX 48 [*Hatfield v. Arch of Kentucky, Inc.*, BRB No. 95-1279 BLA, at 3 (BRB Sept. 29, 1995) (unpublished decision)]). In that decision, the Board noted that Employer had "requested and was granted a hearing on the sole issue of whether good cause existed for the late filing of employer's controversion" but that Judge Rippey had neither held a hearing nor decided the good cause issue. *Id*. at p.3.

On May 9, 1996, Judge Rippey issued a Supplemental Decision and Order on Remand that addressed the good cause issue (hereafter "Supplemental Decision"). In the Supplemental Decision, Judge Rippey found that good cause did not exist, specifically stating that "[n]egligence can never constitute good cause, and does not in this case." (DX 49 [*Hatfield v. Arch of Kentucky, Inc.*, Case

---

[11] Employer's request was actually in response to an Amended Award of Benefits, issued April 14, 1994. (DX 25). However, the letter was worded broadly enough to include a request for hearing on the timeliness issue as well. In fact, on the transmittal memorandum (Form CM-1025) issued after this letter, the only issue listed is whether or not "good cause [] exist[s] for the late filing of a controversion." (DX 27).

[12] I addressed the procedural history of this claim in greater detail in my previous Decision and Order Denying Modification and Granting Benefits of February 18, 1999, in particular at pages 4-5. I find it unnecessary to re-capsulate the procedural history in full, as the only issue before me on this remand is the controversion timeliness issue. Thus, my focus will be on the filings and decisions addressing this particular issue.

[13] Judge Rippey originally had dismissed Claimant's duplicate claim because Claimant failed to file a timely response to an Order to Show Cause he issued concerning the merits of the duplicate claim. (DX 34, 37, 39).

No. 1994-BLA-1364, at 2 (OALJ May 9, 1996)]). Judge Rippey based his decision on the Director's Exhibits alone, as a hearing was never held on the issue. As a result, Claimant's benefits were reinstated and Employer filed a timely appeal.[14] (DX 50, 51).

On appeal, the BRB issued a decision on February 13, 1997, which vacated Judge Rippey's Supplemental Decision and remanded the action back to this office.[15] (DX 61). The BRB specifically noted that Judge Rippey's failure to hold a hearing "deprived employer of the opportunity to offer testimony with regard to the issue of good cause." (DX 61, at 3 [*Hatfield v. Arch of Kentucky, Inc.*, BRB No. 96-1141 BLA (BRB Feb. 13, 1997) (unpublished decision) (citing *Pyro Mining Co. v. Slaton*, 879 F.2d 187 (6th Cir. 1989))]). Thus, the BRB provided for the case to be remanded back to the OALJ for a hearing solely on the good cause issue. In particular, the BRB stated they were "remand[ing] th[e] case to the [ALJ] for a decision on the good cause issue only. If the [ALJ] finds that good cause is not established, then claimant is entitled to benefits, employer having waived its right to contest any other issue." [16] (DX 48).

In response to this decision, Employer submitted a Motion for Reconsideration and Suggestion for Rehearing *En Banc* on March 13, 1997 and, nine days later, submitted a Motion for Remand for Modification Proceedings. (DX 62, 64). The BRB issued an Order on May 16, 1997, which "remand[ed] th[e] case to the district director for consideration of employer's motion for modification." (DX 69). However, the BRB inexplicably did not address the good cause issue at all. (*See also* DX 70).[17]

---

[14] It should also be noted that Employer retained new counsel – his current counsel, Ronald Gilbertson, Esq. – who entered his appearance via letter dated May 29, 1996. (DX 50).

[15] The remand to the Office of Administrative Law Judges did not occur, because of the Board's subsequent remand of Employer's modification petition to the district director while a motion for reconsideration was pending, as discussed below.

[16] The BRB also wrote that "[i]f the [ALJ] finds good cause established, . . . he may, within his discretion, either re-open the record or remand the claim to the district director for further evidentiary development." (DX 48, at 8 (citations omitted)).

[17] Although a panel of the Board originally acknowledged error in this remand, the *en banc* Board decided that it was not error to remand the case for consideration of the modification petition because it was confined to the good cause issue (even though that issue was not mentioned in the Order.) *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 99-0615 BLA, 96-1141 BLA (BRB May 16, 2001) (*en banc*) at p. 5-6. If the modification petition related to the district director's decision, it was untimely, and if it related to Judge Rippey's decision, that decision was vacated. While the fact that the decision was vacated did not trouble the Board, because of the pending reconsideration motion, the *en banc* Board found the petition to be "premature" because Claimant had not yet been paid any benefits when it was filed (suggesting, again, an error in the remand). *Id.* at p. 5-6. However, the Board was not troubled by that either, finding it "procedurally inconsequential whether employer has filed a timely petition for

Claimant's action eventually returned to this office on August 5, 1997, with the issue listed as: "That the decision awarding benefits to the miner on the basis of total disability due to pneumoconiosis should not be modified." (DX 77).[18] In an Order of October 3, 1997, Administrative Law Judge Edward J. Murty, in response to Employer's motion, issued an Order which determined that the Employer had filed a timely modification based upon the payment of benefits by the Trust Fund, that further development of the medical evidence (to include a new medical examination) was appropriate, and that amendment of the issues listed on the transmittal form was unnecessary because in modification petitions, an administrative law judge can conduct a *de novo* review of factual determinations and an employer can raise any issues of entitlement previously determined. Judge Murty denied reconsideration of this Order sought by Claimant.

On March 24, 1998, the undersigned held a hearing on this matter in Abington, Virginia, in which both parties participated and were represented by counsel. (DX 74; Tr. at 1-2). At the hearing, counsel for Employer stated that he would not present any evidence on the good cause issue, taking the position that the issues raised by the Petition for Modification made the good cause issue moot. (Tr. at 9). Claimant's counsel, on behalf of Claimant, agreed that the procedural issues raised by this action were confusing and also took the position that the action should be treated as a modification proceeding. (Tr. at 11). The hearing transcript reflects both parties' views, as none of the testimony addressed the good cause issue. Employer summarized its argument on the good cause issue with the following passage, from its post-hearing brief:

> The good cause issue has been rendered moot by the current modification proceedings. Under modification the [ALJ] has the duty to rethink all of the evidence. So the result is the same whether treated as good cause, or treated as modification. *See Jonida Trucking Co., Inc. v. Hunt*, 124 F.3d 739, 743 (6th Cir. 1997) (finding [ALJ's] treatment of untimely appeal as timely a moot issue, since under modification the result would be the same). The "good cause" issue, however, never should have been raised, since employer's original controversion was valid. Furthermore, the Department [of Labor's] service of its December 1, 1993 finding was not properly served.

Employer's Post-Hearing Brief at 5 n.4 (filed June 22, 1998). Claimant's post-hearing brief did not address the good cause issue. On February 18, 1999, the undersigned issued a Decision and Order

---

modification" because "[w]hether employer has filed a timely petition for modification or not, employer is entitled to a *de novo* hearing and subsequent finding solely on the issue of whether employer established good cause for its untimely controversion. . . " *Id.* at 7.

[18] There was no reference on the transmittal form CM-1025 to either section 725.413 or the good cause issue. (DX 77).

Denying Modification and Granting Benefits. *Hatfield v. Arch of Kentucky, Inc.*, Case No. 1997-BLA-1670, at 7 n.10 (ALJ Feb. 18, 1999). Regarding the good cause issue, I determined (adopting Judge Murty's analysis) that this issue need not be addressed, as the issue was made moot by virtue of the Motion for Modification. *See id.* As I noted in that decision, Employer's counsel argued that "it would be virtually impossible for the Employer's current counsel to reconstruct what occurred back in early 1993 when the case was handled by previous counsel."[19] *Id.* On March 15, 1999, Employer filed a timely appeal of the February 18, 1999 decision.[20]

The BRB issued a Decision and Order on September 26, 2000, in which the February 18, 1999 Decision and Order Denying Modification and Granting Benefits was vacated and the Employer's Motion for Reconsideration was granted. *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 99-0615 BLA (BRB Sept. 26, 2000) (unpublished) (granting Employer's Motion for Reconsideration on BRB No. 96-1141 BLA). In its decision, the BRB specifically stated that Employer's untimely controversion could not be treated as a request for modification pursuant to 29 C.F.R. § 725.413(b)(3) and all previous determinations to the contrary were reversed. *Id.* at 7-8. Once again, the BRB remanded the action to the OALJ "for a hearing solely on the issue of good cause." *Id.* at 8. Employer filed a Motion for Reconsideration and Suggestion for Rehearing *En Banc* on October 18, 2000.

In an *en banc* Decision and Order of May 16, 2001, the BRB granted Employer's motion for reconsideration *en banc* but denied the relief requested. On rehearing, the *en banc* Board held that (1) Employer's untimely controversion of the Notice of Initial Finding cannot constitute a request for modification under section 725.413(b)(3);[21] (2) pursuant to section 725.310, an employer may file a motion for modification of an ALJ's finding that good cause for an untimely controversion has not been established pursuant to section 725.413(b)(3); and (3) a motion for modification regarding the issue of good cause does not entitle the employer to a decision addressing the merits of the claim. *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 99-0615 BLA, 96-1141 BLA (BRB May 16, 2001) (*en banc*). The Board declined to address any substantive issues relating to the claim, as the Board held that the good cause issue needed to be resolved prior to any determination on the merits of the action.

---

[19] I further noted that, while the good cause issue need not be addressed, "I disagree[d] with Judge Rippey's assertion that clerical error [could] never constitute good cause as well as with his determination that the circumstances outlined by Employer would not constitute a showing of good cause." *Hatfield v. Arch of Kentucky, Inc.*, Case No. 1997-BLA-1670, at 5 n.7 (ALJ Feb. 22, 1999).

[20] Employer also used this appeal as an opportunity to reinstate a prior appeal to the BRB, originally filed on May 29, 1996. The BRB acknowledged both appeals and issued an Order consolidating them, dated March 22, 1999.

[21] See, however, *National Mines Corp. v. Carroll*, 64 F.3d 135 (3d Cir. 1995) (finding untimely response to award of benefits under section 725.419(a) to constitute a timely modification petition on the merits of the claim, even though a timely controversion had not been filed either.)

Ultimately, the Board vacated the undersigned's determination that it was unnecessary to consider the good cause issue and remanded the action for a hearing solely on that issue.[22] *Id.*

On remand, the undersigned issued a Notice of Assignment and Order on August 14, 2001 and both parties filed timely responses and statements indicating that they waived the right to an oral hearing. On September 12, 2001, Employer, through counsel, filed "Employer's Motion for Summary Judgment Denying Claim as Untimely." I denied Employer's Motion by my Order of September 24, 2001,[23] which also set up a schedule for submission of evidence and briefing. Although the parties were given until October 29, 2001 to submit evidence, neither party did so. However, both parties submitted timely briefs in support of their positions.

DISCUSSION

Despite the lengthy procedural history involving this case and the numerous procedural and substantive issues raised at various times, the only issue before this tribunal at this time is whether or not good cause exists to excuse Employer's untimely filing of its controversion. Before addressing the merits of the excuse offered by Employer for its late filing, a brief recitation of the procedural guidelines for the filing of benefits under the Act at the time Claimant brought this claim is necessary.

The Black Lung Benefits Act and its implementing regulations establish certain procedures that must be followed by both the claimant and the responsible operator(s) when a claim is made for benefits under the Act. *See* 30 U.S.C. § 901 *et seq*. The specific procedures "to be applied in the filing, processing, adjudication, and payment of claims filed under part C of title IV of the Act" are set forth in Part 725, Title 20 of the Code of Federal Regulations. 20 C.F.R. § 725.2(a) (1999). Initially, the claimant must file a claim form (Form CM-911) with either the Office of Workers' Compensation Programs, United States Department of Labor (the district director) or with the Social Security Administration (for forwarding to the district director). *See id.* § 725.304. After the claim form is received by the district director, he or she is required to "take such action as is necessary to develop, process, and make determinations with respect to the claim . . . ." *Id.* § 725.401. This process permits the district director to determine which former employer should be the designated responsible operator

---

[22] The Board did not, however, find it necessary to clear up the procedural morass in this case, because of the necessity to address the good cause issue. See footnote 17 above. Thus, the procedural posture of this case remains unclear on this remand.

[23] My denial was based upon the Board's recent decisions, which make it clear that the timeliness of Claimant's duplicate claim is irrelevant at this stage of the proceedings and may only be raised if, following a hearing confined to the issue of the timeliness of Employer's controversion, it is determined that there was good cause for the untimely controversion. Order Denying Employer's Summary Judgment Motion and Scheduling Proceedings of September 24, 2001 at page 3.

(the entity liable for payments if it is determined that the claimant is entitled to receive benefits) as well as to make an initial finding of injury and eligibility for benefits. *Id.* §§ 725.410(a)-(b), 725.412(a).

Once the district director identifies a responsible operator and makes initial findings, the district director's office notifies the identified employer that it is a named party in a claim for benefits and attaches all necessary documentation, including copies of the claim form and a Notice of Initial Findings.[24] *Id.* § 725.412(b). Section 725.413 sets forth the guidelines for an operator's response, stating, in pertinent part, that "[w]ithin 30 days after receipt of notification issued under §725.412, unless such period is extended by the deputy commissioner [district director] for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability [by written response]."[25] *Id.* § 725.413(a). If a named operator fails to respond within the thirty day period, the district director is required to treat this as an acceptance of the initial findings and the operator will be barred from raising the issues resolved in the Initial Findings or presenting evidence with respect to these issues in subsequent proceedings; in sum, the operator effectively will have waived any right to dispute these findings and they become binding upon expiration of the thirty day period. *Id.* § 725.413(b)(3). An operator's only available remedy if it submits its response late is to show that good cause exists to excuse the late filing. *Id.* This determination is initially made by the district director and is discretionary. If unsatisfied with district director's determination, a party can request a hearing before an administrative law judge on the good cause issue only and, again, this determination is discretionary. *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 190 (6th Cir. 1989) (establishing that OALJ has jurisdiction to hear good cause issue); *Krizner v. U.S. Steel Mining Co.*, 17 BLR 1-31, 1-34 (BRB 1992) (adopting *Pyro Mining* for all actions).

As mentioned above, the district director notified Employer by letter of July 21, 1993 that Claimant filed an action identifying Employer as the responsible operator and Employer did not contest this designation. (DX 18, 19). Employer accepted this designation by filing a timely operator response form on August 11, 1993, which addressed the responsible operator issue only, at that point the only contested issue. (DX 19). On December 1, 1993, Employer was sent the Notice of Initial Finding, which was received by Employer on December 10, 1993 and by its counsel on December 8, 1993 (as reflected by the certified mail return receipt postcards, DX 13), making Employer's response to these findings due thirty days later, a point that this notice made clear in the last paragraph. (DX 13). However, Employer missed this deadline by over a month, as indicated by the date on the

---

[24] According to the regulations, the district director may, at his or her discretion, notify the responsible operator of its potential liability any time after "sufficient evidence has been made available to [the district director]." 20 C.F.R. § 725.412(a) (1999). Thus, the Notice of Claim and the Notice of Initial Findings do not have to accompany each other. In this action, Employer was notified of the claim on July 21, 1993 via a Notice of Claim and submitted a timely operator response form on August 11, 1993, wherein the Employer accepted this designation. (DX 18, 19).

[25] The record contains no evidence of any requests for or grants of an extension.

controversion form itself (February 22, 1994) and admitted to in Employer's letter of March 17, 1994 asking the district director to find good cause for the late filing.[26] (DX 15, 20). In his letter, Employer's former counsel set forth his entire justification for the late filing in a single paragraph, which explains that his office experienced some personnel turnover and, as a result, the paper work related to this claim was mistakenly miscalendared. Essentially, Employer's former counsel argued that the Notice of Initial Finding simply got "lost-in-the-shuffle" during the transition period at his office and, based on this alone, good cause should be found to accept the late controversion form. Employer's current counsel offers nothing new in the way of evidence to support the late filing and has merely recycled former counsel's excuses.[27]

It should be noted that in its brief (at pages 3 and 12), Employer also argues that the late filing should be excused due to the fact that the Notice of Initial Findings was not served by certified or registered mail in violation of 33 U.S.C. § 919(c).[28] This argument is simply untrue. The record clearly shows that the Notice of Initial Finding was sent via certified mail to both Employer's attorney of record and to the Employer in care of Underwriters Safety and Claims, Employer's designated agent, at the same addresses to which the original notice of claim was sent; certified mail receipt postcards reflecting receipt of the Notice of Initial Finding by both addresses appear in the record. (DX 13, 18). Employer provided no other address to the district director and first raised this meritless argument years after the fact.

Section 725.413 clearly states that an operator's late filing may only be excused upon a showing of good cause. However, this portion of the regulations fails to define "good cause." In addition, there is very little precedent available defining this term in the context of this particular section, largely due to the fact that this is "a discretionary finding to be rendered [initially] by the deputy commissioner [district director]." *Saylor v. Warner Coal Co.*, 12 BLR 1-205, 1-206 (BRB 1988), *rev'd on other grounds sub nom. Pyro Mining Co. v. Slaton*, 879 F.2d 187 (6th Cir. 1989). Here, as noted above, the district director did not find good cause to exist. Additionally, what little precedent exists regarding this particular section is typically confined to jurisdictional issues and/or situations involving lack of notice by the employer or its carrier. *See, e.g., Pyro Mining*, 879 F.2d at 190 (establishing that a party unsatisfied with the district director's determination may request a *de novo*

---

[26] The controversion was hole-stamped received by "DCMWC" on February 23, 1994. (DX 15).

[27] Obviously, Employer is not limited solely to the justifications raised in the March 17, 1994 letter, but Employer has presented no new evidence or justifications in the past eight years. Employer waived its right to an oral hearing herein, stating that "an oral hearing would be of [no] benefit in this claim." (Counsel's letter to undersigned of 9/12/01, at 2). Moreover, Employer submitted no additional evidence in the proceedings before me, although it was expressly permitted to do so by the undersigned's Orders.

[28] The cited section is part of the Longshore and Harbor Workers' Compensation Act applicable to certain black lung claims. *See* 30 U.S.C. §§ 925, 932.

hearing on the issue of the adequacy of the notice provided and finding no reversible error committed by ALJs in excusing for good cause untimely controversions due to inadequacy of notice). Thus, very little guidance exists regarding the applicable standard to apply when determining whether or not an employer has established good cause.

The regulations define "good cause" in 20 C.F.R. § 725.226, albeit in a different context, as this section establishes what constitutes good cause to excuse a claimant's survivor's delayed filing of proof of support in a survivors' claim. Under this section, a late filing will be excused (1) when the delay was due to certain circumstances beyond the individual's control, such as physical incapacity, or (2) when the individual relied upon incorrect or incomplete information sent by the Office of Workers' Compensation Programs (OWCP), or (3) when the individual made efforts to obtain supporting evidence needed in a survivors' claim and did not know that such information could be submitted after the actual proof of support was filed. 20 C.F.R. § 725.226(a)(1)-(3) (1999). More importantly, the section specifically identifies what does not constitute good cause, stating that good cause will not be found when "the individual was informed that he or she should file within the prescribed period and he or she failed to do so deliberately or through negligence." *Id.* § 725.226(b) (emphasis added). Unfortunately, this section is not incorporated by reference and, thus, is not directly applicable to the case at hand. Furthermore, this particular section and section 725.413 serve different purposes and cases involving late filings under section 725.226 (if any exist) are not very analogous due to the more paternalistic attitude towards claimants, who are frequently unrepresented, as opposed to coal mine operators who are likely to have access to counsel. Still, this section is instructive, as it shows that, despite these factors, as well as the remedial purpose of the Act and broad scope of coverage intended, a survivor is required to provide more of a justification than mere negligence when attempting to show good cause to excuse an untimely filing. It is reasonable to believe that a similar, if not a higher standard, would apply to late filings by an employer, especially one represented by an experienced attorney – *i.e.* something more than mere negligence must be shown.

In a case very similar to the one at bar, Administrative Law Judge Edward Miller found there to be no good cause, and that determination was upheld by the Benefits Review Board and the U.S. Court of Appeals for the Fourth Circuit. *Duelley v. Eastern Associated Coal Corp.*, Case No. 1990-BLA-2348 (Miller, ALJ, Oct. 5, 1995), *aff'd sub nom Eastern Associated Coal Corp. v. Director, OWCP*, No. 98-1214, 177 F.3d 43 (table), 1998 WL 957453 (4th Cir. Sept. 22, 1998) (unpublished disposition). Moreover, no good cause was found by another administrative law judge, Judge Gerald Tierney, on the employer's petition for modification filed subsequently (on June 23, 1999). *Duelley v. Eastern Associated Coal Corp.*, Case No. 2001-BLA-0088 (Tierny, ALJ, Aug. 23, 2001). In that case, the claimant (whose previous claims had been denied) filed a third claim and, in a Notice of Initial Finding, the OWCP found that the claimant was entitled to benefits. The employer there admitted to filing a controversion form after the thirty day time period, but explained that it was the result of "administrative problems encountered as a result of a decision to consolidate the handling of black lung claims with [another entity's] in-house staff." *Eastern Associated Coal Corp. v. Director, OWCP*, No. 98-1214, 1998 WL 957453 at *1. Apparently, the in-house staff attorney

normally responsible for black lung claims was busy handling other issues related to a buy-out that the company was experiencing and, as a result, no one was aware that the notice of initial findings was sent. *Id.* at *1-*2. In addition, the employer argued that the notice indicated that it would be amended and they believed that the thirty day period did not begin until they received the amended version, an argument that the court rejected as well. *Id.* at *2. The Fourth Circuit described the employer's purported justifications as unreasonable and specifically stated that "[h]eavy workload or inattention to office chores do not constitute good cause." *Id.* at *4 (citing *Father & Sons Lumber & Bldg. Supplies, Inc. v. N.L.R.B.*, 931 F.2d 1093, 1096 (6th Cir. 1991); *Mollura v. Miller*, 621 F.2d 334, 335 (9th Cir. 1980)). While this Fourth Circuit case is an unpublished decision, it is consistent with the holdings of other courts confronted with similar justifications for a late filing arising in different situations, discussed below.

Similarly, in *Rex W. Moore v. Eastern Associated Coal Co. c/o Peabody Holding Co.*, No. 1992-BLA-1787 (Lesniak, ALJ, April 4, 1994), Administrative law Judge Michael Lesniak found no good cause in a situation in which the employer filed a controversion which was dated on July 27, 1979 but was not mailed until August 27, 1979 and received on August 28, 1979, due to clerical error by a secretary. During testimony at an October 1993 hearing, the employer's compensation and benefits manager testified that he was unable to explain why the controversion did not make it from his secretary's desk to the post office and assumed it was a clerical error. He also indicated that if he had prepared an affidavit back in 1979 he would have a copy, so apparently the employer did not explain the reason for the problem at an earlier date.

However, not all cases involving purported clerical error weigh against employers. In *Sewell Coal Company v. O'Dell*, 16 Fed.Appx. 129, 2001 WL 845155 (4th Cir., July 26, 2001) (unpublished disposition), the Fourth Circuit noted that an administrative law judge, Judge Stuart Levin, had found no abuse of discretion by the district director in accepting a controversion that was filed 18 days late. Counsel for the employer explained that "due to an oversight in this office, the claim file was not forwarded to the employer's legal counsel so that a controversion could be filed." *Id.* at *5. The Fourth Circuit refused to disturb Judge Levin's determination that there was "'good cause' for the belated filing" in view of the nine-year delay in raising the argument combined with the Court's own review, which found no "abuse of discretion inhered in the acceptance of [the employer's] late controversion." *Id.*

The Sixth Circuit has also addressed what constitutes good cause, but these cases arise in a different context. Instead, most of these cases address relief from entry of either default or default judgment under Rules 55 and 60 of the Federal Rules of Civil Procedure. A party requesting relief from an entry of default must proceed under Rule 55, which requires a showing of good cause, and if default judgment has been entered, must proceed under Rule 60(b)(1), which governs motions to set aside final judgments due to "mistake, inadvertence, surprise, or excusable neglect." These provisions are somewhat analogous, as awards of benefits based upon untimely controversions may be considered to be "default judgments" entered against employers. *See, e.g., Pyro Mining*, 879 F.2d at 188. *See*

also National Mines Corp. v. Carroll, 64 F.3d 135, 136 (3d Cir. 1995) (award of benefits was "essentially a default judgment" in view of employer's failure to respond to notice of initial findings); *Tazco Inc. v. Director, OWCP*, 895 F.2d 949 (4th Cir. 1990) ("default award of benefits" issued in light of employer's failure to respond to notice of initial findings).[29] The Sixth Circuit recognizes that trials on the merits of an action are favored as opposed to judgment by default, which the court views as "a drastic step which should be resorted to only in the most extreme cases." *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990); *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983). However, the Sixth Circuit also recognizes that once a judgment has been entered, "public policy favor[s] the finality of judgments and termination of litigation," a policy that must be considered when determining whether or not relief is warranted. *Waifersong, Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). In balancing these policies, the Sixth Circuit has developed one test to be applied either in the face of an entry of default or a default judgment, requiring the court to weigh (1) whether the non-moving party will suffer any prejudice if the default is set aside, (2) whether the moving party can assert a meritorious defense, and (3) whether the moving party's culpable conduct led to the default.[30] *Waifersong*, 976 F.2d at 292; *United Coin*, 705 F.2d at 845. Finally, the Sixth Circuit has noted that "[w]here default [judgment] results from an honest mistake 'rather than willful misconduct, carelessness or negligence' there is especial need to apply Rule 60(b) liberally." *United Coin*, 705 F.2d at 845 (quoting *Ellingsworth v. Chrysler*, 665 F.2d 180, 185 (7th Cir.1981)).

Applying the first two prongs of the Sixth Circuit's test, it does not appear that the Claimant will suffer any "prejudice," as there has been no showing that there has been any loss of evidence or other difficulties occasioned by the delay,[31] and it appears that Employer can assert a "meritorious defense,"

---

[29] By failing to file a timely controversion form, a responsible operator is deemed to accept the initial findings and to waive its right to take a contrary position in subsequent proceedings. 20 C.F.R. § 725.413(b)(3) (1999). Essentially, what occurs after the thirty day period expires is the proposed findings become final, akin to a final judgment, as the employer no longer is entitled to a hearing on the matters resolved by the initial findings.

[30] The standards used in applying the test to the two situations differ, as relief from an entry of default need only a showing of good cause; when a party is asking the court to set aside an entry of default judgment, the "stricter standards" of Rule 60(b) must be satisfied. *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990) (citing *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 194 (6th Cir. 1986)); *see also Mfrs. Indus. Relations Ass'n v. East Akron Casting Co.*, 58 F.3d 204 (6th Cir. 1995) (requiring moving party to show more than good cause when seeking relief from default judgment); *Waifersong*, 976 F.2d at 292 (same).

[31] The BRB actually noted the potential prejudice to Claimant if forced to reimburse the trust fund for the benefits he received while this claim was pending. In an unpublished decision of September 26, 2000, the BRB stated that "[c]ontrary to employer's contention, claimant would be prejudiced if employer's untimely controversion were permitted not only by a loss of benefits, but also by having to

in that there is a possibility that Employer will prevail on the merits. *See INVST Financial Systems, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 397-99 (6th Cir.) *cert. denied*, 484 U.S. 927 (1987). The third prong – relating to whether culpable conduct or excusable neglect is involved – is less clear. The Sixth Circuit has indicated that it is enough for the moving party to offer a credible explanation for the delay that does not exhibit disregard for judicial proceedings, if the other two prongs are satisfied. *Id.* at 399. Although the Sixth Circuit has not explained what would constitute a credible explanation, it appears that the standards for establishing good cause in the Sixth Circuit may be somewhat less stringent than elsewhere.

In *Pretzel & Stouffer v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45-46 (7th Cir. 1994), the Seventh Circuit declined to accept "mis-calendaring" as a justification for setting aside entry of default.[32] In making this determination, the court wrote that "'routine back-office problems . . . do not rank high in the list of excuses for default . . .' Counsel's mistake regarding the date of the hearing, and communication problems with his clients, were just such 'routine' problems [and] do not establish good cause for defaulting." *Id.* at 46 (citation omitted).

The United States District Court for the Middle District of Florida has also rejected the mere "human error" justification when presented to that court. *Insurance Co. of North America v. Morrison*, 156 F.R.D. 269 (1994). There, a party requested relief caused by a "paper work snafu," which resulted in a plaintiff's complaint being routed to the commercial loan department of a bank rather than the legal department.[33] *See id.* at 272. When addressing the merits of the bank's justification, the court stated that clerical error or oversight "do[] not provide a basis upon which the relief sought [reconsideration of a motion to set aside default and vacate default judgment previously denied] can be granted."

Whether or not the mistake Employer relies on to establish good cause qualifies under Rule 60(b)(1) in the Sixth Circuit can be debated *ad infinitum*, as this circuit has not directly addressed the issue or justification being debated before this tribunal, and this issue is further complicated by the

---

potentially repay an overpayment of interim benefits already received." *Hatfield v. Arch of Kentucky, Inc.*, Case No. 99-0615 BLA, at 9 n.10 (BRB Sept. 26, 2000) (emphasis added); *see also* DX 77. The potential harm was again noted by the BRB in their unpublished *en banc* decision from May 16, 2001, in particular at pages five and six and in footnote three. However, the Sixth Circuit has specifically addressed this sort of "potential injury" and rejected it. *Youghiogheny & Ohio Coal Co. v. Benefits Review Bd.*, 745 F.2d 380, 382-83 (6th Cir. 1984).

[32] The attorney also offered as a justification the fact that he encountered communication difficulties when trying to contact his client. *Id.* at 45.

[33] Specifically, the bank received the complaint, but they did not read it; rather, they mechanically forwarded it the wrong department and, even when the error was discovered, they still took no action. *Id.*

dearth of evidence submitted by Employer here. While it appears that the Court requires something more than pure unilateral or inadvertent mistake before relief will be granted, no Sixth Circuit case directly addressing the particular factual scenario presented here has been located. *Compare FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 685-86 (6th Cir. 1999) (rejecting as sufficient grounds for relief under Rule 60(b)(1) an attorney's unilateral mistake in interpreting the law) *with United Coin*, 705 F.2d 846 (permitting relief when attorney's mistake was due to misleading information provided by opposing counsel).

In the instant case, it can be inferred from counsel's letter that the deadline was missed due to a changeover in the personnel at his law firm responsible for calendaring due dates, which took place around the time that the Notice of Initial Finding was issued or shortly thereafter. The identity of the personnel involved and an explanation of what exactly happened in counsel's office is lacking, and counsel has not addressed what happened to the notice provided to the Employer and why no action was taken on it either. This case is factually indistinguishable from the two untimely notice of controversion cases discussed above that found no good cause to exist (*Duelley*, which involved a transfer of responsibilities to another entity's in-house counsel, and *Moore*, which involved a secretarial omission by Employer's staff). While the third found good cause (*O'Dell*, which involved an oversight by counsel's office staff), in that case, the late controversion was accepted by the district director and was first challenged years later, a fact which appears to have carried weight.[34] While there are slight (insignificant) factual differences between the instant case and the default cases discussed above arising in different circuits – *Pretzel* (involving miscalendaring) and *Morrison* (involving misrouting) – they are also examples of courts holding that good cause does not exist when the purported justification amounts to little more than administrative hardships within a law office.

After reviewing the record and the justification offered by Employer, in the context of the cases discussed above, I find that its vague miscalendaring excuse does not rise to the level of good cause contemplated by the regulations. Although I originally intimated (in a footnote in my previous decision) that the circumstances concerned here could be considered good cause, I had expected some further explanation of what actually occurred. Employer has had sufficient opportunity to fully develop its case as to this issue in the last eight years, and particularly since the most recent remand for a hearing on the good cause issue alone. However, the Employer has not done so and has, instead, relied on nothing more than the same letter presented to the district director in 1994. While it is true that Employer has changed counsel while this claim for benefits has been litigated and that this adds an additional wrinkle in defending this action, it is not the insurmountable obstacle current counsel would like this tribunal to

[34] Further, in *O'Dell*, the Fourth Circuit noted with particularity that it would not disturb Judge Levin's decision (and the BRB's affirmance of it) absent a showing that he abused his discretion. Likewise, Judge Levin was reluctant to set aside the district director's acceptance of the employer's excuse years after the fact absent an abuse of discretion.

believe it to be.[35] Additionally, while the undersigned notes the difficulty one attorney faces when faced with the prospect of defending a previous attorney's actions, especially when those actions harmed the client, counsel here has done little more than throw his hands in the air and cry "Uncle" in defending this action. Numerous methods were available to counsel to develop evidence, as I implied at the hearing. (Tr. 10). For example, counsel could have submitted affidavits from individuals (either at former counsel's office or at Employer's place of business) with knowledge of what occurred or other supporting documents to explain what sort of "personnel changeovers" actually occurred that led to the late filing. Instead, I am left with a vague and unsupported reason that simply does not amount to good cause under relevant precedent.[36] Finally, if good cause were found under these sparse facts, then one would be hard pressed to think of a justification that would be insufficient to excuse a late filing. Under such a construction, relief would be based on an assertion of mere cause, not a showing of good cause as the regulations require. The effective result would be that these deadlines would essentially cease to exist.[37] Thus, for all the reasons discussed above, I find that Employer has not established good cause for its late filing and Employer's controversion is untimely.

Based upon my finding that Employer has not established good cause, Employer is deemed to have waived its right to contest Claimant's entitlement to benefits. Claimant is therefore automatically entitled to benefits and it is unnecessary to address any other issues.

ORDER

IT IS HEREBY ORDERED that, Employer having failed to establish good cause for its untimely controversion, the claim of Claimant Fred Hatfield for benefits under the Act is **GRANTED.**

A
PAMELA LAKES WOOD

---

[35] At the March 24, 1998 hearing, counsel for both parties addressed the good cause issue. (Tr. at 8-11). Employer's counsel informed this tribunal that Employer was not focusing on that issue and, even if he were to address it, counsel doubted that he could actually add anything more than what was already in the record. (Tr. at 10). Counsel does not appear, however, to have tried.

[36] While I continue to disagree with Judge Rippey's assessment that negligence can never constitute good cause, if negligence is the offered defense, the party asserting it must, at the least, attempt to explain why such action, or inaction as is the case here, occurred before it will be seriously considered, as I indicated in *In re Paone*, Case No. 1991-BLA-0799 (Wood, ALJ Aug. 30, 1996).

[37] In making these comments, I recognize that there are policy considerations warranting the acceptance of untimely controversions when good cause has been shown, as I discussed in my previous decision.

Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.